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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re M.C., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

M.C.,

Defendant and Appellant.

G040312

(Super. Ct. No. DP011967)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Caryl Lee, Judge. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Karen L. Christensen and
Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

* * *

N.C. (mother) appeals the denial of her Welfare and Institutions Code section 388 petition¹ and the termination of her parental rights over M.C. (now age three). Mother contends the court abused its discretion by denying her section 388 petition after a full evidentiary hearing. She further asserts the court's termination of her parental rights was detrimental to M.C. under the beneficial relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) We affirm.

FACTS

By petition dated June 27, 2005, Orange County Social Services Agency (SSA) alleged that four days earlier, M.C. was born “with a positive toxicology screen for methamphetamine” and mother, too, had tested positive for methamphetamine. SSA further alleged mother had used the drug during her pregnancy with M.C. and had “a history of substance abuse dating from December 2004.” Based on these allegations, SSA alleged M.C. came within the description of section 300, subdivision (b) because mother failed to adequately protect him.

Detention and Jurisdiction

In its detention report, SSA stated mother admitted using methamphetamine during her pregnancy. She had been “arrested for being under the influence of a

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

controlled substance and . . . ordered to complete Penal Code [section] 1000 classes,” but had failed to “complete her classes due to financial hardship and was terminated from the program.” Mother reported “she began using methamphetamine late in life and ha[d] only been smoking methamphetamine for the past year.” She did not know who M.C.’s father was. In an interview with the social worker at the hospital, “mother inquired [about] relinquishing her parental rights and freeing the child for adoption.” “The mother appeared to be very unsure of what she wanted to do regarding the child and was informed that she should take the time to explore her options”

The court detained M.C. and authorized twice weekly visitation for mother and funding for three times weekly drug testing. Mother was accepted into the dependency drug court program on July 7, 2005, but two weeks later, SSA moved she be dropped from the program due to several tests deemed positive. In August 2005, mother enrolled in a residential chemical dependency program and therefore was not dropped from the dependency drug court program.

In its jurisdiction report, SSA stated mother had two other children, ages 15 and 13, whose father had full custody of them. Mother was divorced from their father. The court declared M.C. a dependent child and ordered family reunification services for mother, including parenting classes, drug testing and treatment, and weekly monitored visitation.

Six-Month Review

At the time of the six-month review mother was in phase 3 of the dependency drug court program and had consistently tested negative for drugs. She was employed and “her last reported residence was with her grandmother.” At mother’s request, her monitored visits of two hours a week had “not been increased or liberalized.” It appeared to the social worker that mother was “undecided” about whether to reunify

with M.C. SSA recommended the court continue mother's reunification services and schedule a 12-month review hearing. The court adopted SSA's recommendations.

In February 2006, as authorized by the court, mother began unmonitored visits. In May 2006, her visits were increased. During that month, the court encouraged mother to talk with M.C.'s pediatrician about the child's diet and stated: "Since we are headed toward returning your child to you[, w]e want you to always be in the role of the mother as much as possible."

Twelve-Month Review

M.C. was placed in a foster home in February 2006, when he was eight months old, where he "appear[ed] to be thriving." Mother was residing with her grandmother, unemployed, and attending paralegal classes. She was in the final phase of perinatal and dependency drug court, had "consistently drug tested up to three times per week, . . . and all test results ha[d] been negative for tested substances." She had "her two teenage daughters every other weekend." Mother expressed ambivalence as to whether she could "handle" M.C. when she did get him back because she was taking care of her sick grandmother and her other children and was pursuing her own education. SSA reported her visits with M.C. had "not increased substantially"; she had eight hours of unmonitored visits per week "with another two hours to be added as soon as [she] determine[d] when this can take place." It appeared she wanted "to make the best decision she [could] for [M.C.], however, reunification with her child seems to be an added challenge that [mother had] as yet been unable to demonstrably integrate into her future planning in any meaningful way." In June 2006, mother graduated from dependency drug court.

At the 12-month review hearing, as recommended by SSA, the court scheduled an 18-month review hearing, after finding a substantial probability M.C. would be returned to mother's physical custody within six months.

Eighteen-Month Review

In its report for the 18-month review hearing, SSA recommended the court terminate reunification services and schedule a section 366.26 hearing. Mother was then residing with her grandmother and “employed full time in a legal office.” She had withdrawn from the paralegal program because of “her need to earn a salary” She wished to care for her grandmother to repay “this relative for all the times her grandmother was there for her when [mother] had no other support.” Although mother had obtained a job in her field of choice, she felt the pay was “far below what she [would] need to support herself let alone herself and a child.” Mother spent “every other weekend with her two teenage daughters” who felt M.C. was “very cute.” “As to incorporating her role of being [M.C.’s] mother on a daily and permanent basis, [mother had failed] to demonstrate any significant progress. Although she consistently and willingly visit[ed] the toddler once each week, [mother], by her own admission, [was] uncertain as to when or how she would be able to prepare for the return of [M.C.] on a full time basis. [Although mother had] periodically mentioned the possibility of having overnights with [M.C.], but despite encouragement from the [social workers and [M.C.’s] foster parent, mother had] been unable to actually schedule such a visit.”

“As the Eighteen-Month Review hearing approache[d] it appear[ed] that . . . mother ha[d] become somewhat comfortable with the routine of her once weekly visits with [M.C.]. [Mother] further state[d] that she knows the child is happy and well cared for in his current foster home and does not want to suddenly take him out of his loving family.” On October 11, 2006, the social worker asked mother “what needed to happen to assist [M.C.] to begin to attach to her, to begin to switch his focus from his foster mother alone to [mother], as his mother. [Mother] offered the following, ‘More time, I think. See him more.’ The [social worker] requested that [mother] decide how that could happen and to convey her ideas to the [social worker] within a week by

telephone. [Mother] did not contact the [social worker] via any method regarding that request.”

On November 30, 2006, mother stated she did not want to give M.C. up and needed more time to reunify. She mentioned overnight visits with M.C. but had not obtained a separate bed for him nor had she looked into day care possibilities. The social worker concluded scheduling an overnight at that time did not seem to be in M.C.’s best interests. She reported: “[M.C.’s] behavior around visitation with his mother . . . has changed as he advances in age. He has become more and more resistant to accepting the exchange between his foster mother and his mother on visiting day. [M.C.] has screamed, cried, and pushed away from mother as a part of his process of objecting. He has learned to sign through his Physical Therapist and his objections are now being exhibited by signing ‘please’ and pointing to his foster mother during the process of being put in the care of [mother]. He also begins to whimper when he sees his mother’s car. To date, [M.C.] has not reached for his mother, smiled at her, hugged her back, or responded to her requests for kisses during this exchange. As per his foster mother, [M.C.] exhibits the following behaviors after returning home from his parent/child visits; clinging to his foster mother, unhappy when foster mother tries to put him down, wakes 2 or 3 hours earlier in the morning, has needed to be rocked to sleep at times and appears exhausted and unsettled upon arriving home.”

M.C. was “clearly attached to his current foster mother as exhibited by his happy, smiling, active behavior and his frequent initiating of physical and verbal interactions with her. This little boy also demonstrate[d] his well developed confidence and comfort level within his foster family environment as he busily [went] about self assigned activities in all areas of the home and as he interact[ed] with his foster father and 6 year old brother.”

On December 12, 2006, the court continued the 18-month review hearing and ordered county funds be made available for a crib to enable overnight visits to begin in two weeks.

In its addendum report for the 18-month review hearing, SSA summarized the foster mother's notes concerning M.C.'s visitation with mother. Weekly overnight visits had commenced. M.C. sometimes suffered diaper rash after visits; in the foster mother's view, the rash resulted from mother's continued use of baby powder despite the foster parents' warnings to her of its effects on M.C. In addition, M.C. often experienced diarrhea after visits, exhibited clingy and more aggressive behavior ("frequent temper tantrums" and "throwing things and hitting"), and had abnormal sleep patterns. The social worker reported: "Despite the recent rather rigorous 7-week visitation schedule as set up and approved by the Court, [M.C.'s] behavior around visitation with his mother . . . has become increasingly disturbed. He continued to be resistant to accepting the exchange between his foster mother and his mother on visiting day." The social worker interpreted M.C.'s increasingly aggressive behavior as the child's effort "to use the only means he has at his disposal to tell his caretakers that he is increasingly unsettled, less secure and in need of almost constant reassurance."

On January 25, 2007, the court ordered visitation for mother the next weekend and the continuation of her Wednesday overnight visits with M.C. In an addendum report for the 18-month hearing, SSA stated mother was unable to take M.C. for the weekend visit because of work obligations. Mother's grandmother described M.C. to the social worker as follows: "He just goes about his own business. He really doesn't want to bother about anyone else. He does his own thing. . . . He looks at things, but he doesn't touch the things. . . . He has a temper though. . . . He will lay right down on the floor — kicks." In contrast, the social worker had observed M.C. at his foster home, where the toddler was "busy, active, curious, playful, social, easily engaged and most definitely interactive with his foster brother and his foster parents."

At the 18-month review hearing, the court observed mother had consistently expressed ambivalence about being with her child and was not in a position that day “to have the child back.” The court stated, “I’m not sure what Mom really wants, and I’m not sure she even knows.” But the court expressed its belief mother had “been successful in drug court and . . . turned her life around and . . . taken herself out of the shadows of failure,” and therefore her weekend and Wednesday overnight visitation should be continued subject to SSA’s discretion to liberalize or scale back the visits. The visitation would serve “as a dry run” to see if mother could succeed as a single working mother. Because the statutory time had “more than run,” the court “formally” terminated services and scheduled a section 366.26 hearing (the .26 hearing), but expressed its willingness to consider a section 388 petition from mother if she desired to seek M.C.’s return.

SSA’s Report for the .26 Hearing

In a July 2007 report for the .26 hearing, SSA stated that since February 8, 2007, M.C. had had regular “contact with his mother, teen-age half sisters and his maternal great-grandmother,” including weekend visits lasting from Friday evening until Sunday mid-afternoon, Wednesday overnights, and some additional holiday hours. Mother also took M.C. to, and participated in, his rehabilitation centered program every Wednesday. “During the six weeks between March 8, 2007 and April 17, 2007, [M.C.] had seven visits with his physician . . . for examinations and treatment relating to hives and other medical issues including cough, runny nose, fever and diarrhea following extended visits with his mother.” M.C. seemed “to be displaying a cyclical pattern of physiological responses related to his parent/child visitation.” The foster parents had observed him “to have excessive outbursts of anger, i.e. throwing himself on the floor or banging his head against the walls; hitting, slapping and biting; having excessive bowel movements following visitation . . . , diarrhea, random hand flailing; irregular eating

behavior; extreme clinginess; unable to settle down to sleep independently; nightmares and screaming out at night.” Upon seeing his mother during visitation exchanges, he generally went to her “without resistance, but does not run to her, does not reach out for her and does not exhibit excitement upon seeing her. He has, however, tried to put his seat belt back on in his foster parent’s car, has sunk down in his car seat without an attempt to get out, has hung on to his foster parent as his mother has approached, has cried twice upon seeing her, has tried to hide in his foster parents’ car when arriving at the exchange point, has closed his eyes upon seeing her and has hidden his head on his foster parent’s shoulder as his mother approached him.”

Upon his return to his foster parents, he exhibited “excitement, smiling, calling out to his foster parent saying ‘Dada or Mama,’ reaching for his foster parent, attempting to run to foster parent and holding on to foster parent with expressions of happiness. . . . He has also turned toward his mother after returning to his foster parent and when she called to him, [M.C.] responded, ‘Go, go Nina’ and gestured for her to leave.” The social worker stated: “Since at this time in the Court process, the focus is on [M.C.] and what is in his best interest, it is necessary to consider two year old [M.C.’s] own responses to his current situation. . . . [I]n three major areas of this child’s life, his physical health, his emotional stability and his daily patterns of behavior, [M.C.] is experiencing dramatic changes. [M.C.] also seems to be exhibiting a loss of his feelings of security and is spending a good deal of energy being hyper-vigilant as to the location/presence of the only parents he has ever known, the only people that he has learned to depend on to meet all his needs.” M.C. had resided with his foster parents for over a year and appeared comfortable, content, and happy in their home. “Due to [his] appealing looks, his good health, his generally appropriate development within age expectations and his young age, [M.C.] is highly adoptable.” The foster parents wished “to provide him with the permanency and stability that is offered through adoption.”

SSA recommended the termination of mother's parental rights and the selection of adoption as M.C.'s permanent plan.

Section 388 Petition

In a section 388 petition, mother challenged the court's order terminating her reunification services and scheduling a .26 hearing. Mother asked the court to return M.C. to her care under a family maintenance plan, or alternatively, for a 60-day trial return or an increase in her overnight visitation. Mother declared her circumstances had changed since the termination of her services because she had continued her "education through paralegal courses in order to obtain stable employment and to provide the best life possible for [M.C.]." The courses had prevented her from using her "permitted visitation to the fullest extent." She now had three overnight visitations per week and accompanied "[M.C.] to his occupational therapy . . . every Wednesday." She believed returning M.C. to her custody was in his best interest because her relationship with him was one "of a loving and caring mother." During visits, she fed, bathed, played with and read books to him, and also took him to the park. She stated that although "the transition period from his foster home to [mother] may be trying on [M.C.], he [was] very happy and content once he [was] home with [her]." She monitored his health, went with him to doctor's appointments and contacted his doctor about his health. Mother enjoyed "the little things about [their] relationship, such as him tugging on [her] pants and leading [her] around the house." Mother averred: "He has come to recognize me as his mother and feels comforted by my presence. [M.C.] reaches for me, gives me kisses, snuggles with me, puts his arms around my neck to hug me, and is very affectionate with me. Being able to spend the nights with his mother, [M.C.'s] trust towards me has increased tremendously. [¶] I know that I had expressed doubts about reunification early on, but my desire is to reunify with [M.C.] and I will not give up now that I have come so far. I have been working hard to attain increases in visitation with him and stabilize my life

because I want [M.C.] in my life.” Mother also declared her two daughters had become bonded with M.C.

In an addendum report, SSA offered the following responses to mother’s section 388 petition: Although mother did successfully complete dependency drug court, she did not “successfully complete the reunification portion of her case plan” as she “seemed unable to decide on whether . . . she could incorporate [M.C.] into her life on a full time basis for the first [18] months of [M.C.’s] existence” Mother left the paralegal “program in order to obtain more immediate paid employment.” Mother’s “incrementally increasing visitation plan” was ordered by the court and designed by the social worker (not mother) and did not begin until M.C. was 19 months old. Previously, mother had been visiting the child about 8 hours a week. Recently, mother’s visitation had been “limited to two non-consecutive nights during the week” because of M.C.’s diarrhea and rash problems. Mother’s “description of [M.C.] as a ‘happy baby’ when he is with her does not seem to be exhibited in any observable way,” and was not corroborated by mother’s parenting coach. The social worker expressed concern that mother’s “comments reflect her own needs and feelings rather than [M.C.’s] growing and developing needs and feelings.” The social worker noted mother’s description of her daughters’ bonding with M.C. “is from the perspective of the older girls in that they ‘have become attached to their little brother.’”

The parties stipulated to holding a full evidentiary hearing on mother’s section 388 petition.

Bonding Study

In a July 16, 2007 hearing, when M.C. was almost two years old, M.C.’s counsel requested the court to order two bonding studies — one between M.C. and mother, and one between M.C. and his foster parents — to determine if “there would be long-term serious emotional damage to the child if the child were removed from the

foster parents.” M.C.’s counsel observed the case was unique because parents who succeed in drug court generally get “the child back right away,” but here, “mother was not having visits at the time she graduated and completed drug court.” She noted the “mixed opinions on” M.C.’s reaction to visits with mother. Counsel for SSA and the foster parents supported the motion for bonding studies. Mother’s counsel did not, arguing it was “obvious that the child is probably bonded with both Mom and with [the] caregivers.” In addition, counsel argued “a built-in prejudice” existed against mother. Mother’s counsel asked, if the court did order a bonding study, for at least one more overnight visit per week for mother. The court denied mother’s request for an additional overnight because mother already had M.C. “half the time.” The court granted the request for a bonding study. Patricia Yglesias was appointed the bonding expert.

Meanwhile, SSA suspended mother’s weekend visits and then reduced mother’s visitation to two non-consecutive nights a week due to recurrent diaper rashes and diarrhea. This resulted in a “reduction in the severity of the child’s diaper rashes.” SSA “arranged for Julia Cavin, Senior Social Worker, to provide [mother with] parent coaching.” “[M.C.] has been observed to display behavior characteristic of a younger child during visits with his mother . . . as observed by [the parenting coach]. These behaviors include his asking for bottles in place of eating solid foods and spending long hours in a crib sleeping or watching videos.” In contrast, his foster mother reported M.C. “had not used a bottle for much of the past year and [had] slept in a toddler bed for as long.”

The bonding expert reported her observations of M.C. with mother in a one-hour session at the expert’s office, with his foster mother and brother in a three-quarter hour session at the expert’s office, and with his foster father in a three-quarter hour session at the expert’s office. The expert found “[M.C.’s] existing bond with [mother] is filled with anxiety and apprehension.” The expert observed “a warm, secure, reciprocal parent-child interaction” between M.C. and his foster parents, and a “sibling

bond” with his foster brother. The expert warned there was “a high likelihood that severance of this bond would result in long-term emotional damage to [M.C.]” In her view, M.C. was “already exhibiting signs of emotional damage,” such as being “distant, aloof, and detached.” The expert “recommended that [M.C.] continue to be placed in the [foster parents’] home”

The Section 388 Hearing

The hearing on mother’s section 388 petition began on February 11, 2008, when M.C. was over two and a half years old. In response to mother’s objection to the admission of SSA’s reports at the hearing, the court ruled it would not consider SSA’s reports filed after December 3, 2007.

Mother’s daughters (M.C.’s half sisters) testified. The then 15-year-old half sister testified she had been present on almost every weekend visit mother had with M.C. She believed some of the information in SSA’s reports was incorrect. The other half sister, then 18 years old and a nursing student at UCLA, believed SSA’s report was false when it claimed that M.C. does not interact with his sisters and “brushes [them] away.” She believed M.C. sought comfort in mother, and was happy when mother holds him. Both sisters described games they play with M.C. and testified he frequently laughs out loud during visits. Both testified he always called mother, “Mom,” “Mommy,” or “Mama,” never “Nina.” Both testified that when they part from M.C. at the drop-off point, he gives them a kiss and hug, then simply acknowledges and walks over to the foster father.

M.C.’s early intervention teacher (who holds a bachelor’s degree in child and adolescent studies) at the Rehab Institute of Southern California testified on mother’s behalf. M.C. had been in the program for 10 months to promote his social skills, speech and fine motor skills. The teacher was familiar with mother and the foster mother as the two mothers split the responsibility of bringing M.C. to the two and a half hour therapy.

She testified M.C. called mother “Mom.” Mother always stayed, participated in the therapy with M.C., and actively asked questions. The teacher described the interaction between M.C. and mother as “loving.” He would sit in her lap and look for her if she was out of sight. Mother was able to comfort him. They laughed together. Often, in the afternoon toward the end of class, M.C. would say he wanted to go to Grandma’s house (where mother resided). The teacher was aware that M.C. had “a difficult time with foods, liking any food,” both with his foster family and mother. She recalled the social worker observing the class only once.

The bonding expert, called by mother as an adverse witness, testified she accepted written questionnaires from the foster parents, but not the one offered by mother. The expert testified the prior judge in the case had directed her not to request any additional information from mother. Although the expert observed M.C. with his foster parents *and* his foster brother, she did not have mother “bring her two daughters to the evaluation.” After the expert was questioned by counsel for all parties, mother’s counsel moved to strike the bonding study and the expert’s testimony on grounds they were “fundamentally unfair and fundamentally flawed.” The court denied the motion, stating these issues went to the weight of the evidence.

Mother’s parenting coach was also called by mother as an adverse witness and testified that when she was first assigned the task, she was told only “that the child had been going back to the foster home with severe diaper rash.” The parenting coach had no concerns about mother’s parenting skills until the sixth visit when the coach observed a basket of the grandmother’s medicines on the kitchen table. The coach did not observe whether the medicines had childproof tops despite the significance of that factor. On another visit, the coach observed a dime and a fake fingernail on the floor. The coach was also concerned that the grandmother’s oxygen tank was kept in a corner of the living room. The coach’s concerns “over the course of . . . time . . . were primarily things that I look back as a pattern of someone not being aware of what a toddler can get

into and what could harm him.” She was also concerned the house was often dark in the mornings, and M.C. seldom laughed out loud.

The social worker also testified as an adverse witness called by mother. Regarding the foster parents’ journal or log on M.C. she included in her reports, the social worker testified it was “typical for [her] to ask foster parents to keep a log of . . . what’s going with the children.” She had not asked mother to keep a log of her overnight visits with M.C. and could not explain why she failed to ask mother to do so. She had observed four visitation exchanges where the foster mother delivered M.C. to mother. In two of those exchanges, M.C. “wanted to stay with [his] foster mother.” Mother completed all elements of her case plan. At one time, mother expressed concern her income was inadequate to support herself and M.C., subsequently mother never “indicated any change in her income to” the social worker.

Mother testified that at the time of the 18-month review hearing, she was asking for overnight visits with M.C., but did not feel “prepared to have M.C. home with” her. She worked as a legal secretary then and still did. In December 2006, she “made a mistake and . . . hesitated,” feeling “detached from M.C.,” afraid and not emotionally ready. In February 2007, she was “ready to have him home with” her, but again she hesitated. She was still feeling detached and afraid. But after she began having M.C. on weekends, they “bonded more and momentum built,” and she realized she had nothing to fear. She testified M.C. did *not* spend a lot of time at her house in his crib watching television. Every weekend they “would be off doing something.” Regarding the parenting coach’s concern that the house was dark in the mornings, mother stated they did not take M.C. outside while the grass was still wet. But they normally went outside, for example, to a local park or Irvine Park or played in a pool in the yard. She believed she and M.C. had a relationship where “he trusts [her] and [she] love[s] him and he loves [her].” On the day she and M.C. met the bonding expert, mother “had not seen him over the weekend” and “he seemed reserved towards” her and “angry at” her. The bonding

expert arrived late so mother and M.C. had to wait in the hallway for 15 minutes. M.C. “was fine until [they] got there” and “then he drew back and he didn’t want to go in there.” When the bonding expert opened the door, M.C. “immediately . . . withdrew.” Mother “had to pick him up and bring him in” and “he was very combative.” He was “uncomfortable,” “whiny and angry.” “It felt like he was on alert for some reason.” Mother did not display physical bonding with M.C. to the bonding expert, because Mother believed the interview was intended to be a “sit-down conversation” and interview. Thus, she told the expert her “whole life story” instead of getting on the floor to play with M.C. M.C. sometimes came to mother from the foster parents with a diaper rash. She did not give him a bottle anymore.

The court denied mother’s section 388 petition. The court gave mother “the benefit of the doubt” and found mother’s circumstances had changed subsequent to the court’s order terminating her services, because mother had changed her mind and now wanted M.C. to live with her. The court found mother’s testimony to be “extremely credible, extremely insightful and just very, very honest . . .” (As to mother’s prior substance abuse problem, all parties had agreed Mother’s drug court participation was “stellar” and “exemplary,” and the court stated mother was to be “absolutely commended for addressing a hugely serious problem” with no evidence of “any relapse on the horizon.”) But the court found that granting mother’s petition would not serve M.C.’s best interests. The court reviewed the evidence that M.C. suffered diaper rash and exhibited behavioral problems suggesting “separation difficulty.” It found the parenting coach’s observations to be “beneficial” because she did not “know the posture of the case . . .” It noted the bonding expert’s observation that when M.C. “became unmanageable, . . . mother was not able to employ the proper parenting skills to neutralize the situation.” The court stated: “And why are we seeing the difficulties with the diaper rash and the behavior that resulted in decreased visitation? Why are we seeing these comments that there isn’t reciprocal bonding or the emotional attachment? [¶] It’s

probably because this child has never lived with mother. This child has lived with his current caretakers since February of 2006 and mother has not been able to take on the role as parent for this little boy. She loves him. I think that he responds to her favorably. . . . I think that he does not, in his little mind, consider her his mom.”

The .26 Hearing

The .26 hearing began on March 25, 2008. Mother testified that over the past six or eight months, whenever she picked up M.C. for a visit, he was happy to see her. He smiled, hugged her, and said, “Hi, Mommy.” At home, they were “inseparable”; he followed her around or looked to her for help. At the park, he often said, “Watch, Mommy, watch,” or “Mommy, look,” and constantly sought her attention. When necessary, she disciplined him. Toward the end of a visit — about 10 minutes before he was to be picked up by the foster father — M.C. would “get a little anxious,” wanted to be held, and wanted to go home with mother. On one occasion, after the foster father put M.C. in the car, the child kept calling out “Mommy” to mother in a loud voice “like a plea.” The moment was “heart wrenching” for mother and her daughters, and they suffered an “emotional breakdown.” Mother believed M.C. would benefit from a continuing relationship with her because he would have “emotional stability,” “more family,” and he would “grow stronger” and “not have a void in his life.” She felt he would be “confused at some point if [she was not] in his life.”

The court acknowledged “this was a very, very difficult case,” but ordered the termination of mother’s parental rights and the placement of M.C. for adoption. The court found no statutory exception applied. The court noted the social worker, the parenting coach, and the bonding expert all observed “there was some parental depth lacking and . . . there was not the type of bond . . . one would have expected [between] the biological mother and the child.” “The court simply [did] not see the nature of the parental bond . . . contemplated within the discussion of [*In re Autumn H.* (1994) 27

Cal.App.4th 567].” The court noted a bond did exist between M.C. and mother, but it was not “so strong that the child would suffer detriment.” The court also took into account M.C.’s “young age and the fact that he does look to the [foster parents] for most of his parenting needs.”

DISCUSSION

The Court Did Not Abuse Its Discretion By Denying Mother’s Section 388 Petition

Mother contends the court abused its discretion by denying her section 388 petition. Under section 388, subdivision (a), a parent “may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change” a previous court order. “If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held” (§ 388, subd. (c).) Accordingly, to succeed on a section 388 petition a petitioner must establish “by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child.” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) The petitioner bears the burden of proving by a preponderance of the evidence that “the child’s welfare requires such a modification.” (Cal. Rules of Court, rule 5.570(h)(1).)

Section 388 serves “as an ‘escape mechanism’ to ensure that new evidence may be considered before the actual, final termination of parental rights.” (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506.) In this way, “[s]ection 388 is central to the constitutionality of the dependency scheme” (*ibid.*) and to the satisfaction of a parent’s due process rights. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Nonetheless, “[o]nce reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.” (*Ibid.*)

“The grant or denial of a section 388 petition is committed to the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is clearly established. [Citation.] A trial court exceeds the limits of legal discretion by making an arbitrary, capricious or patently absurd determination.” (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.) ““The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.”” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Mother contends the court abused its discretion by denying her petition without considering all the factors listed in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*) on the issue of M.C.’s best interests. In *Kimberly F.*, the mother lost custody of two children solely because her house was “dirty and unsanitary.” (*Id.* at pp. 521-522.) In a section 388 petition, the mother declared her “house was no longer unsanitary.” (*Id.* at p. 525.) A social worker disagreed, testifying “she saw several extension cords through stacks of newspapers, books and clothes” in mother’s home. (*Ibid.*) The trial court denied the mother’s section 388 petition. A different panel of this court reversed the trial court’s order. (*Id.* at p. 532.) In doing so, this court identified three factors useful in determining a child’s best interests under section 388: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*Id.* at p. 532.) Applying these factors, this court stressed that “the condition of the house . . . was the only *legitimate* obstacle to the children’s return” (*id.* at p. 527) and “the record show[ed] the problem [had] been removed.” In addition, “an undisputedly strong bond exist[ed] between the mother and her children” (*id.* at p. 532), and the children had resided with the mother prior to the dependency. (*Id.* at p. 523.)

The three factors listed in *Kimberly F.* — two of them focusing on the problem leading to the dependency — were particularly apt in that case because a single obstacle blocked the return of the children to their mother. The *Kimberly F.* court clarified that its list was “not meant to be exhaustive.” (*Kimberly F.*, *supra*, 56 Cal.App.4th p. 532.) In addition, these three factors are not necessarily pertinent to every case. Although *Kimberly F.*’s “approach is appropriate in some cases, [it] is by no means the only way for the court to consider the issues presented in a petition for modification under [section] 388.” (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2007 ed.) § 2.140[5], p. 2-345.)

Thus, we reject mother’s argument that the court, in determining M.C.’s best interests, should have considered her “absolute amelioration” of her substance abuse problem. At the time of mother’s petition, her substance abuse problem was not the obstacle blocking M.C.’s return to her. Rather, the operative problems, as shown by substantial evidence, were that M.C. did not view mother as his parent and suffered harm as a result of his visits with her. The court properly considered these factors, as well as the strength of M.C.’s bonding to his foster parents. In other words, the court considered the appropriate factors in this case.

Mother next contends her “extensive visitation with [M.C.] . . . effectively resulted in a joint custody arrangement.” She concludes her requests for increased visitation or a 60 day trial visit were “no more than the equivalent of a family law request to modify a ‘co-parenting residential agreement.’” She asserts in “those situations, there is no presumption in favor of continued custody” and therefore the court erred by allegedly applying the presumption in favor of the foster parent’s “continued custody.”

For this novel proposition, mother refers us to *In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508 (*Birnbaum*). But that case involved divorced parents who had joint legal and physical custody of their daughters. (*Id.* at p. 1510.) The appellate court affirmed the trial court’s order which did not change “the prior order for joint legal

and physical custody of the children,” but merely rearranged the timetable of when the children would reside with each parent. (*Id.* at p. 1512.) Under those circumstances, the appellate court held “there has been no change of custody,” and therefore the proponent parent was not required to justify the order with a showing of material changed circumstances or the children’s best interest. (*Id.* at p. 1513.)

Birnbaum is inapposite. Mother does not have legal or physical custody of M.C. Moreover, our review of the record does not reveal the court applied a presumption in favor of continued placement with the current caretakers, nor does mother point us to any record reference to support her allegation.

Finally, mother contends the “court erred when it based its decision to deny her section 388 petition on her perceived lack of parenting skills.” She points out that her request for either a 60 day release or placement under family maintenance services would have required SSA to supervise mother’s care of M.C., and the court could have ordered mother to take additional parenting classes. This argument ignores the other, more fundamental grounds for the court’s denial of the petition, such as M.C.’s view of his foster parents (and not mother) as his parents and the emotional harm he suffered from visits with mother.

For all of the foregoing reasons, the court did not abuse its discretion by denying mother’s section 388 petition.

Substantial Evidence Supports the Court’s Finding the Section 366.26, Subdivision (c)(1)(B)(i) Beneficial Relationship Exception Did Not Apply

The preferred disposition at a .26 hearing is to “[t]erminate the rights of the parent . . . and order that the child be placed for adoption” (§ 366.26, subd. (b)(1).) “[A]doption should be ordered unless exceptional circumstances exist.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) An exception to the adoption preference occurs when termination of parental rights would be detrimental to the child because the parent has

“maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) “The parent has the burden of proving that termination would be detrimental to the child” (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252), and must establish that “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) “If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*)

“[P]leasant and cordial . . . visits are, by themselves, insufficient to mandate a permanent plan other than adoption.” (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) Similarly, “frequent and loving contact” is insufficient to establish the type of beneficial relationship “contemplated by the statute.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) “‘Interaction between [a] natural parent and child will always confer some incidental benefit to the child,’” but the basis of a beneficial relationship is that the parent have “occupied a parental role.” (*Id.* at p. 1419.) A “child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

“The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.” (*In re Autumn H., supra*, 27 Cal.App.4th at pp. 575-576.)

On review, applying the substantial evidence test, we “accept the evidence most favorable to the order as true and discard the unfavorable evidence” (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.) We give “the prevailing party the benefit of every reasonable inference and [resolve] all conflicts in support of the order.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) “‘Evidence sufficient to support the court’s finding “must be ‘reasonable in nature, credible, and of solid value; it must actually be “substantial” proof of the essentials which the law requires in a particular case.’”” (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.)

In arguing she met the requirements of the substantial relationship exception, mother relies heavily on the recent case of *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*). There, the appellate court reversed the trial court’s order terminating the father’s parental rights. (*Id.* at p. 303.) The father had been his daughter’s primary caregiver for her first three years of life, but upon his “drug-related” arrest, she was placed with her maternal grandparents. (*Id.* at p. 293.) By the time of the 12-month review hearing, the father had “‘‘‘complied with every aspect of his case plan,’ including maintaining his sobriety and consistently visiting” his daughter. (*Ibid.*) “‘‘‘It pain[ed] the social worker] not to be able to reunify [the father] and his daughter”” (*id.* at p. 294) due to his “physical and emotional health” problems. (*Id.* at p. 293.) Three times a week the father had supervised visits with his daughter who “became upset when the visits ended and wanted to leave with” the father. (*Id.* at p. 294.) A social worker stated the daughter “had a consistent and positive relationship” with the father, but “looked to her grandmother for security, safety, guidance and parenting.” (*Id.* at p. 295.) At a .26 hearing, a bonding expert described the bond between the child and her father as “‘‘‘fairly strong”” or “‘‘‘moderate.”” (*Ibid.*) The expert “concluded that because the bond between [the father and his daughter] was fairly strong, there was a potential for harm to [the child] were she to lose the parent-child relationship.” (*Id.* at p. 296.)

The trial court terminated the father's parental rights, after finding he "maintained frequent and loving contact with [his daughter] and they shared an emotionally significant relationship; however, there was no evidence to suggest [the relationship] was parental in nature or that it would be greatly detrimental to the child to terminate [the] relationship." (*S.B.*, *supra*, 164 Cal.App.4th at p. 296.) The appellate court reversed the trial court's order terminating parental rights. (*Id.* at p. 303.) The appellate court explained that a child's "significant attachment to a parent" (*id.* at pp. 298-299) "typically arises from day-to-day interaction, companionship and shared experiences, *and may be continued or developed by consistent and regular visitation* after the child has been removed from parental custody." (*Id.* at pp. 299.) The court found the record supported the conclusion the father had "continued the significant parent-child relationship *despite* the lack of day-to-day contact with [his daughter] after she was removed from his care." (*Ibid.*) "The record show[ed the daughter] loved her father, wanted their relationship to continue and derived some measure of benefit from his visits. Based on this record, the only reasonable inference [was she] would be greatly harmed by the loss of her significant, positive relationship with" her father. (*Id.* at pp. 300-301.) The court stated the beneficial relationship exception does *not* require "proof that the child has a 'primary attachment' to a parent or that the noncustodial parent has maintained day-to-day contact with the child." (*Id.* at p. 300.) The court observed that "at any one time a child may have more than one parent or person acting as a parent." (*Ibid.*)

Mother tries to equate her case with *S.B.* by mischaracterizing the trial court's findings here. She asserts the court found she and M.C. "had a parent-child relationship and that [M.C.] benefited from that relationship." In fact, although the court did recognize mother performed some parental roles such as diaper changes, baths, feedings, and outings, the court explicitly found the relationship between mother and M.C. did not reflect the necessary parental bond for the beneficial relationship exception

to apply. And although the court stated M.C. received some benefit from his relationship with mother, it noted that there “is almost always a benefit” conferred by a parent unless it is “a horribly abusive biological parent.” Furthermore, the record does not support mother’s assertion the court “found that the exception did not apply because [M.C.] looked primarily to his foster parents to meet his needs because he spent more time in their care.”

The salient facts in *S.B.*, *supra*, 164 Cal.App.4th 289, were (1) the father had been his daughter’s primary caregiver for her first three years of life; (2) after her removal from him, the father had continued the parent-child relationship through consistent visitation; and (3) the child significantly benefited from his visits. Those facts are absent from the instant case. M.C. was removed from mother at birth. By her own admission, she felt detached from him for his first 20 months of life. During that time, mother overcame her drug problem, gained employment, took care of her aging grandmother, and integrated her daughters into her life. Her efforts are to be commended. Unfortunately, during that same timeframe, M.C. was growing and developing from an infant into a toddler. As SSA stated, “It was [M.C.’s] developmental task to bond with his foster family, which he’s done.” Accordingly, substantial evidence supports the court’s finding that the beneficial relationship did not apply.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.